Supreme Court, U.S.
FILED

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NO. _____

In the Supreme Court of the United States

January Term 1999

Matthew Alan Dalhauser
and
Larry Mahan
Petitioners
v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Were the due process rights provided by the Fifth Amendment to the Constitution of the United States of America violated when there was insufficient evidence to support the judgment to revoke the probation of Defendants.

2. The findings of the trial court constituted an abuse of discretion and violated the Defendants rights to due process.

LIST OF PARTIES

Pursuant to Sup. Ct. R. 14(b), the Petitioner submits the following list of parties to the proceedings below :

Matthew Allan Dalhauser, Defendant

Larry Mahan, Defendant

United States of America, Plaintiff

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OPINIONS BELOW

The opinion of the Court of Appeals for the 11th District of Texas sitting at Eastland, Texas, as to Matthew Alan Dalhauser is unreported. It is reproduced in the Appendix at A. The Defendant Dalhauser's Petition for Discretionary Review, refused on September 16, 1998, is unpublished. It is reproduced in the Appendix at E.

The opinion of the Court of Appeals for the 11th District of Texas sitting at Eastland, Texas, as to Larry Mahan is unreported. It is reproduced in the Appendix at B. The Defendant Mahan's Petition for Discretionary Review, refused on September 16, 1998, is unpublished. It is reproduced in the Appendix at E.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States of America, provides as follows:

> Phrase *means* that no person shall be deprived of life, liberty, property, or of any right granted by statute unless matter involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings. Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

U.S. Constitution - 5th Amendment "... No person... shall be deprived of life, liberty, or property without due process of law."

U.S. Constitution - 14th Amendment, Sec. 1: ..."No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Texas Constitution, Art. 1, Sec. 19: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised except by the due course of the law of the land."

Clearly, in this instance, your Applicants have been deprived of due process of law.

STATEMENT OF THE CASE

This is a state criminal case involving revocation of Defendants' Probation.

Larry Wayne Mahan: A plea bargain was not reached and the trial court deferred the adjudication of appellant's guilt, placed him on community supervision for eight years and assessed a fine of $1,000.00. After hearing on the State's Motion to Adjudicate Guilt, the trial court found that the Defendant violated the terms and conditions of his community supervision by committing the offense of theft, revoked his community supervision, adjudicated his guilt and imposed a sentence of confinement for eight years, and dismissed the appeal. The Court of Appeals, Eleventh District of Texas at Eastland, issued its opinion on March 19, 1998. No Motion for Rehearing was filed..

Matthew Alan Dalhauser. A deferred probation revocation proceeding in Cause No. 9775, and from a Motion to Revoke Probation in Cause No. 9768, in which the trial Court found that the Defendant violated the terms and conditions of his probation. The trial court's finding was made on April 2, 1997, following a hearing before the Court. The Court then adjudicated the Appellant guilty of the underlying criminal offense, for which he had been granted a deferred adjudication and probation, and sentenced Defendant Dalhauser in Cause No. 9768 to a term of imprisonment of ten years confinement in the

Institutional Division of the Texas Department of Criminal Justice, and in Cause No. 9775, to a term of imprisonment of eight years confinement in the Institutional Division of the Texas Department of Criminal Justice.

The 29th Judicial District Court of Palo Pinto County, Texas, Hon. David Cleveland, Judge Presiding, had jurisdiction. The Appeal was to the llth Court of Appeals, sitting at Eastland, Texas. The Petition for Discretionary Review was filed in the Cour to Criminal Appeals of the State of Texas, and was subsequently refused.

The Petitioner, Matthew Allan Dalhauser ("Dalhauser", along with co-defendant, Larry Mahan ("Mahan"), were charged with violating the terms and conditions of their probation by committing theft of property.

The State alleged that Mahan and Dalhauser, along with co-defendant, Miller, unlawfully took items from Dralco, Inc., their place of employment. Dralco is a corporation that, among other things, manufactured laser art objects. Most of these objects are sold to Laze-Art. During the process of manufacturing, a great deal of scrap metal results. This scrap metal is placed in a scrap bin.

David Lang is the owner and president of Dralco, Inc., a Chapter S Corporation. According to Lang, the total value of all the pieces that were recovered was $2,910.47. Lang also testified that most of the pieces that were recovered were not scrap but were completed pieces of laser art objects. Lang also testified; however, that the pieces that were confiscated "could" have been scrap that was reworked into finished pieces. The value of the

pieces as scrap, would have been minimal, maybe $1,000.00.

Keith Spoon, a shop foreman or supervisor at Dralco, testified that on occasion he gave permission to employees to take finished pieces of laser art from Dralco. Spoon also gave permission to various individuals to take scrap from the scrap bin. Spoon further testified that it was Lang's policy that if an employee got permission to take pieces from Dralco, then it would be okay to do this, and Lang knew that Spoon had given permission to people to take the scrap.

Joe Dean Johnson, a former employee of Dralco, was acquainted with Defendants, particularly Larry Mahan. He testified that he had observed individuals taking out pieces of scrap material from Dralco, and that there was ***no policy*** regarding the scrap material, that ***everybody had permission to take what they wanted***. In fact, he directly quoted **Keith Spoon** as saying... "*It's scrap. Take what you want.*" He further testified, "Everybody that worked there, as far as I know, had pieces of LazArt that they took home out of the scrap". "It was just common knowledge that if you wanted some scrap out of the bin that was LazArt, you could take it home". As to the scrap, Johnson testified "Brian Lang would come out and say that it wasn't any good or == most of the time they didn't want to spend the time to repair it, because it would cost more than what the part was worth". He further testified that there was no limit put on him or any other person in his presence as to how much product from the scrap bin could be taken at one time.

Crystal Shirley testified that she was acquainted with the Defendant, Larry Mahan, and testified " Different people had gotten stuff. People from off the street have come in and got stuff out of the scrap barrels. It was just – *we were told if it was in the scrap you could take it*". She further testified that it happened the entire time she worked there, which was for one year.

Marty Ross testified that Mr. Lang had told him that....." as long as it was scrap, that we could get what we wanted".

At the close of evidence, the trial court found that Dalhauser violated the conditions of probation, as alleged, with the exception that the value of the property was $50.00 or more, but less than $500.00, a lesser included offense, and that his probation was revoked, and he was sentenced in Cause No. 9768, to a term of ten years, and in Cause No. 9775, sentenced to a term of eight years in the Texas Department of Crimianl Justice, Institutional Division, and,

At the close of evidence, the trial Court found that Mahan had violated the conditions of probation, as alleged, with the exception that the value of the property was $50.00 or more, but less than $500.00, and that in Cause No. 9662, his probation was revoked and a judgment was entered sentencing him to the penitentiary for a term of ten years.

REASON FOR GRANTING THE WRIT

I. THE FINDING OF THE TRIAL COURT CONSTITUTED AN ABUSE OF DISCRETION, AND VIOLATED THE DEFENDANTS' RIGHT TO DUE PROCESS.

A person commits theft if he unlawfully appropriates property with the intent to deprive the owner of the property. Texas Penal Code Ann. § 31.03(a) (West 1994); Skillern v. State, 890 S.W. 2d 849 (Tex. App. – Austin 1994, pet. ref'd). Appropriation of property is unlawful if it is without the owner's effective consent. Tex. Penal Code Ann. 31.03(b)(1); Skillern v. State. Appropriation must be accompanied by the specific intent to deprive the owner of the property. Skillern v. State. The Defendant must know that his appropriation of the property is without the effective consent of the owner. Mills v. State, 723 S.W. 2d 411,415 (Tex.Crim.App. 1986); Skillern v. State, 890 S.W. 2d at 871. If the Defendant reasonably believes that the owner has given effective consent, then he is not guilty of theft. Menke v. State, 740 S.W. 2d 861 (Tex. App.–Houston [14th Dist.] 1987), cert denied, 490 U.S. 1067 (1989).

The standard is for the appellate Court to view all the evidence without the prism of "in the light most favorable to the prosecution", and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust

In *Jackson v. Virginia*, 443 U.S. 307, L.Ed.2d 560, 99.S.Ct. 2781, the Supreme Court said that it is not necessary that a conviction result from "no evidence: rule applied in *Thompson V. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2 654 (where a black man was convicted on no evidence for dancing in a bar or hall against local law); the rule is now extended to permit collateral attack by habeas corpus on convictions based on insufficient evidence, the test for overturning being "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact, could have found the essential elements of the crime beyond a reasonable doubt. Further, the Court declined to hold (as it did in *Stone v. Powell*, 428 U.S. 465, regarding raising an issue in trial court or waiving it), that a defendant could not attack it collaterally, since defendant's failure to raise the insufficiency of evidence at the State court level was of constitutional level on guilt-innocence, that is, it was not a mere admissibility of evidence in question. The same rule applies in Texas. *Jackson v. State*, Tex. Cr., 672 S.W. 2d 801, for appellate review (1984).

CONCLUSION

In this instance, other employees of Dralco, as well as the Defendants Mahan and Dalhauser, testified that they had permission to remove the scrap from the scrap bin and there were no limitations on the amount of scrap they removed. Keith Spoon also testified that on occasion he had given permission to take finished pieces of laser art as

well as the scrap. For all of the foregoing reasons, the Petitioners, Matthew Alan Dalhauser and Larry Mahan request this Court to grant this Petition for Writ of Certiorari, as there was insufficient evidence for the trial court to revoke their probation, and they were denied due process as no specific intent was shown to deprive the owner of the property.

December 11, 1998

Respectfully submitted,

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APPENDIX

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APPENDIX A - OPINION OF THE 11TH COURT OF APPEALS AT EASTLAND MARCH 19, 1998

. . . . . 11TH Court of Appeals
Eastland, Texas
Opinion

Matthew Allan Dalhauser
Appellant
Vs.

No. 11-97-119-Cr
Appeal from Palo Pinto County

The State of Texas
Appellee

This is an appeal from an order revoking community supervision. Appellant originally entered a plea of guilty to the offense of burglary of a habitation. The trial court convicted Appellant and assessed his punishment at confinement for 10 years and a $1,000.00 fine. Pursuant to a plea bargain agreement, the trial court suspended the imposition of the confinement portion of the sentence and placed appellant on community supervision for ten years. After a hearing on the State's motion to revoke, the trial court found that the appellant had violated the terms and conditions of his community supervision by committing the offense of theft, revoked his community supervision, and imposed the original sentence of confinement for ten years. We affirm.

In his sole point of error, appellant argues that the trial court abused its discretion in revoking his community

supervision. Appellant contends that the evidence was insufficient to support the trial court's findings because appellant and his codefendants had effective consent from the owner.[1]

In a community supervision revocation hearing, the State has the burden of proving by a preponderance of the evidence, that a condition of community supervision has been violated. Jenkins v. State, 740 S.W. 2d 435 (Tex.Cr.App. 1983). The trial court is the trier of facts and determines the weight and credibility of the testimony. Garret v. State, 619 S.W. 2d 172(Tex.Cr.App. 1981); Barnett v. State, 615 S.W.2d 220 (Tex.Cr. App. 1981). Appellate review of an order revoking community supervision is limited to the issue of whether the trial court abused its discretion. Flounroy v. State, 589 S.W. 2d 705 (Tex.Cr.App. 1979).

1

Motions to adjudicate and to revoke involving Toby Ray Miller and Larry Wayne Mahan were heard together with appellant's motion to revoke in this case and a motion to adjudicate his guilt in a separate case. Appellant's appeal challenging the trial court's determination to adjudicate his guilt is dismissed this same day in Cause No. 11-97-120-CR. Miller, Mahan and appellant were alleged to have committed theft by taking laser art objects without the effective consent of Dave Lang. Mahan appealed from the trial court's determination to adjudicate his guilt, and his appeal is dismissed this dame date in Cause No. 11-07-118-CR. Miller has not perfected an appeal.

Dave Lang testified that he was President and owner of Dralco, Inc., a corporation which specializes in laser cutting and precision fabrication. Lang's corporation made laser art objects as well as stainless steel car wash equipment. Lang testified that he hired Joe Hall, a private investigator, after two men came into Lang.'s office wanting to buy "scrap" or "seconds" laser art objects. Lang responded that he did not sell scrap. The men informed Lang that Toby Ray Miller and appellant, both former employees of Dralco, were selling "scrap" from Dralco. Larry Wayne Mahan was still a Dralco employee at this time.

Lang testified that, from "time to time." an employee might be allowed to take one or two pieces of scrap when they asked. Lang testified that he never gage appellant Miller or Mahan permission to take more than 700 pieces of individual laser art eventually recovered.

Hall testified that he purchased pieces of laser art from appellant. The items included in Hall's first purchase were identified by Lang as good quality Dralco products, not seconds or scrap. The next time he purchased from appellant, Hall told appellant that Hall was considering selling the items at "First Monday" in Weatherford. Appellant said that might not be a good idea because First Monday was "awful close to the source of the manufacturer and that we might be detected."

State's Exhibit No. 1 was an inventory of laser art objects. Lang identified the objects as Dralco products. The following laser art objects were purchased from appellant: 1 pick axes, 34 lizard key rings; 9 kokopelli key rings, 13-4.7" kokopelli, 8 fetish bear key rings, 4-6"

kokopelli, 4 child of sun, 1 light SW cover kokopelli, 9 lizard bookends, 7-6" team roper, 5-6" cutting horse, 2-9"team roper, and 1-14" buffalo lamp.

John Keith Spoon, shop foreman for Dralco, testified that Appellant had never asked him for permission to take scrap. Spoon testified that, one time near Christmas, Miller asked if he could take two scrap pieces as presents for his grandmother and aunt and that Spoon had given Miller permission. Spoon further testified that 90 to 95 percent of the laser art objects taken were not scrap.

Appellant, Miller and Mahan all testified that Spoon had given them permission to take scrap. They also presented testimony of two former Dralco employees that people took laser art objects from the scrap bend on a regular basis.

There is sufficient evidence to support the trial court's finding that appellant violated the terms and conditions of his community supervision by committing the offense of theft. Appellant has not established an abuse of discretion. The pont of error is overruled.

There is sufficient evidence to support the trial court's finding that appellant violated the terms and conditions of his community supervision by committing the offense of theft. Appellant has not established an abuse of discretion. The point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

March 19, 1998

Do not publish. See TEX.R.App.O. 47.3(b).

Panel consists of: Arnot, C.J.
and Dickerson, J. and Wright, J.

APPENDIX B **OPINION OF THE 11TH COURT OF APPEALS - LARRY WAYNE MAHAN**

LARRY WAYNE MAHAN
APPELLANT
VS. **NO. 11-97-118-CR**
STATE OF TEXAS
APPELLEE

APPEAL FROM PALO PINTO COUNTY

This is an appeal from an order adjudicating guilt. Appellant originally entered an plea of guilty to the offense of burglary of a building. A plea bargain agreement was not reached. The trial court deferred the adjudication of appellant's guilt, placed him on community supervision for 8 years, and assessed a $1,000.00 fine. After a hearing on the State's motion to adjudicate guilty, the trial court found that appellant violated the terms and conditions of his community supervision by committing the offense of theft, revoked his community supervision, adjudicated his guilt, and imposed a sentence of confinement for 8 years. We dismiss the appeal.

In his sole point of error, appellant contends that the trial court abused its discretion by finding that he violated the terms and conditions of his community

supervision. Appellant argues that the evidence is insufficient.

The revocation hearing was held on two dates. The State presented four witnesses. Appellant and his two codefendants [1] presented ten witnesses.

TEXAS CODE CRIM.PRO.ANN. art. 42.12, § 5(b) (Vernon Supp. 1998) provides:

> On a violation of a condition of community supervision imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 21 of this article. The defendant is entitled to a hearing limited to the determination by the Court of whether it proceeds with an adjudication of guilt on the

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[1] Motions to adjudicate and to revoke involving Toby Ray Miller and Matthew Allan Dalhauser were heard together with the motion to adjudicate in appellant's case. Miller, Dalhauser and appellant were alleged to have committed theft by taking laser art objects without the effective consent of Dave Lang. Dalhauser perfected appeals to this court in Cause Nos. 11-97-119-CR and 11-97-120-CR. Today, the court has affirmed the order revoking Dalhauser's "regular" community supervision in Cause No. 111-97-119-CR, and dismissed the appeal from the order adjudicating Dalhauser's guilty in Cause No. 11-98-120-CR. Miller has not perfected an appeal

original charge. No appeal may be taken from this determination.

Phynes v. State, 828 S.W. 2d 1,2 (Tex. Cr.App.1992); Olowosuko v. State, 826 S.W. 2d 940,942 (Tex.Cr.App.1992). Appellant challenges the trial court's determination to proceed with the adjudication of his guilt. Therefore, this Court lacks jurisdiction to consider appellant's point of error. Phynes v. State, supra; Russell v. State, 702 S.W. 2d 617 (Tex.Cr. App. 1985), cert.den'd 179 U.S. 885 (1986).

This appeal is dismissed.

PER CURIAM

March 19, 1998

Do not publish. See TEX.R.APP.P. 47.3(B)

Panel consists of: Arnot, C.J.
and Dickenson, J. and Wright, J.

APPENDIX C

JUDGMENT OF THE 11TH Court of Appeals
Sitting at Eastland, Texas

Larry Wayne Mahan	*	From the 29th Judicial District Court of Palo Pinto County, Texas, Trial Court No. 9661
Vs. No. 11-97-118-CR	*	March 19, 1998
State of Texas	*	Per Curiam Opinion (Panel consists of: Arnot, C.J., Dickenson, J. and Wright, J.

This Court has inspected the record in this cause and concludes that there is no error in the judgment below. Therefore, in accordance with this Court's opinion, the judgment of the trial court is in all things affirmed.

APPENDIX D

JUDGMENT OF THE 11TH Court of Appeals
Sitting at Eastland, Texas

Matthew Allan Dalhauser	*	From the 29th Judicial District Court of Palo Pinto County, Texas, Trial Court No. 9775
Vs. No. 11-97-120-CR	*	March 19, 1998
State of Texas	*	Per Curiam Opinion (Panel consists of: Arnot, C.J., Dickenson, J. and Wright, J.

This Court has inspected the record in this cause and concludes that the appeal should be dismissed. Therefore, in accordance with this court's opinion, the appeal is dismissed.

APPENDIX E

PORTION OF NOTICE FROM COURT OF APPEALS, 11TH DISTRICT OF TEXAS

Re: Court of Appeals No. 11-87-00118-CR.
Trial Court Case No. 9661
Style: Mahan, Larry W. V. State of Texas

Re: Court of Appeals No. 11-87-00119-CR.
Trial Court Case No. 9768
Style: Dalhauser, Matthew Allan V. State of Texas

Re: Court of Appeals No. 11-87-00120-CR.
Trial Court Case No. 9775
Style: Dalhauser, Matthew Allan V. State of Texas

We have this day received the records from the Court of Criminal Appeals in which Petitions for Discretionary Review were refused in the above causes.

Mandates will be issued by our Court fifteen days from the date of this letter.

Respectfully yours,

Sherry Williamson, Clerk
By: Diana Reynolds, Deputy